Harpal Singh Grewal (from Messrs AJ Ariffin, Yeo & Harpal) v Lembaga Tatatertib Peguam-Peguam & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–17–17 OF 2007
MOHD ZAWAWI J
10 MAY 2010

Legal Profession — Professional discipline — Disciplinary Board — Decision of DB to constitute Disciplinary Committee to conduct investigation into complaint against solicitor — Appeal against decision — Whether there was withdrawal of complaint — Whether DB's decision to constitute Disciplinary Committee proper — Whether DB acted ultra vires the Legal Profession Act 1976 ('LPA') — Whether amended LPA applied to current appeal — Whether instant appeal was incompetent and premature — Legal Profession Act 1976 ss 102(2) & 103B — Legal Profession Amendment Act 2006 ss 35 & 103E

Statutory Interpretation — Construction of statutes — Rules of construction — Whether statutory provision was a procedural rule — Whether provision was mandatory or directory — Whether there were consequences for non-compliance of provision — Legal Profession (Disciplinary Proceedings) Rules 1994 r 7

On 25 May 2005, John Gomez a/l A Gomez ('the second respondent') lodged a complaint with the Advocates and Solicitors Disciplinary Board ('the DB') that his solicitor, Harpal Singh Grewal ('the applicant'), had failed to account for the sum of RM400,000, which was to be used to discharge the second respondent's bankruptcy ('the complaint'). The Investigative Tribunal ('IT') that was appointed by the DB to look into this complaint recommended that the complaint be dismissed because there was a proposal for settlement on terms reached between the applicant and the second respondent. Despite this recommendation the DB decided to constitute a Disciplinary Committee ('DC') to conduct an investigation into the complaint pursuant to s 102(2) and s 103B of the Legal Profession Act 1976 ('the LPA'). Upon receiving the DB's decision on 23 February 2007, the applicant urged the DB to strike out the complaint against him. When the DB failed to do so, the applicant lodged an appeal against the DB's decision to convene a DC to investigate into the complaint. However, on 12 March 2007 the DB informed the applicant that since the situation was now governed by the Legal Profession (Amendment) Act 2006 ('the amended LPA'), which came into force on 2 October 2006, the applicant had one month from receipt of notification of the DB's decision to lodge his appeal and that the appeal should be brought by way of an originating motion that set out the grounds of appeal pursuant to s 103E of the amended

LPA. Thereafter on 26 March 2007, the appellant lodged the present appeal by way of a notice of originating motion. It was the applicant's case that as the complaint had been withdrawn unequivocally before the IT, the DB was mandatorily obliged to strike out the complaint from the register. The applicant further submitted that since the DB had failed to comply with ss 102(3) of the LPA and acted ultra vires the Act, its decision to convene a DC must be set aside. The applicant also submitted that the amended LPA did not apply to the instant case. The DB contended that under r 7 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules') only a complainant had the right to withdraw a complaint, and that too by writing to the director of the DB. The DB also maintained that the instant case was governed by the amended LPA.

Held, striking out the appeal with costs:

(1) It is settled law that if a provision is a procedural one, then even the use of the word 'shall' would not make it mandatory unless the statute itself indicated the consequences of disobedience. In the instant case, the word used in r 7(1) is 'may' and not 'shall' or 'must' and the language was also not in the negative form. The provision of withdrawing the complaint was thus a procedural one and no consequence is indicated in the rule for non-compliance of withdrawal in the manner prescribed (see paras 10–11).

(2) The applicant's submission that the DB had acted ultra vires the Act was without merit. As the amended LPA had deleted s 102 of the LPA, the deleted section was no longer applicable and the DB was not required to furnish any written reasons to the applicant. In any case s 102(3) of the LPA only required the DB to furnish the applicant with its reasons in writing in the event that it decided that a formal investigation was unnecessary and after the applicant made a request for such reasons to be furnished to him. However, in the instant case the DB had decided that a formal investigation was necessary and the applicant had failed to show that it had requested the DB to furnish him with reasons for its decision. Further, the DB was vested with the independent and distinct power to appoint a DC and this discretion was an absolute discretion. Thus there was no breach of the fundamental rules of natural justice as alleged by the applicant (see paras 18, 18(b)–(c), 23 & 25).

(3) Under s 35(1) of the amended LPA, which deals with appeals, the new s 103E will apply to all appeals unless they had already been heard before the coming into being of the new s 103E. Thus for appeals, which are already pending before the High Court as at 2 October 2006 or filed only after 2 October 2006, the amended LPA applied. Since the instant appeal was filed after the date s 103E of the amended LPA came into operation it went without saying that the provisions of the amended LPA applied.

Thus, the applicable provisions in the applicant's case were the provisions of the amended LPA. It is clear that pursuant to s 103E of the amended LPA an appeal could only be brought against a decision of the DB after it had made a decision pursuant to s 100(5), (8), (9) or s 103D of the amended LPA. From the facts of the instant case the DB had merely directed that a formal investigation be conducted by the DC on the complaint, but it had made no decision on the merits of the factual allegations relating to the complaint. As such, there was no provision within the amended LPA to allow the applicant to lodge an appeal against the decision of the DB and the current appeal was incompetent and premature (see paras 34, 36, 38, 41, 48 & 52).

(4) Further, the applicant's own act of withdrawing the first appeal he had filed and of filing the current appeal showed that the acknowledged that the amended LPA applied to the instant case. Thus the applicant had directly or indirectly admitted that the provisions of the amended LPA applied and the principle of estoppel should be invoked against him (see para 41).

[Bahasa Malaysia summary

Pada 25 Mei 2005, John Gomez a/l Gomez ('responden kedua') telah membuat aduan kepada Lembaga Tatatertib Peguambela dan Peguamcara ('LT') bahawa peguamcaranya, Harpal Singh Grewal ('pemohon'), telah gagal mengemukakan sejumlah RM400,000, yang patut digunakan untuk melangsaikan kebankrapan responden kedua ('aduan'). Tribunal Siasatan ('TS') yang telah dilantik oleh LT untuk mengendalikan aduan ini mencadangkan agar aduan ini ditolak kerana terdapat cadangan penyelesaian atas syarat-syarat yang dipersetujui antara pemohon dan responden kedua. Meskipun terdapat cadangan ini LT memutuskan untuk menubuhkan jawatankuasa tatatertib ('JT') untuk mengendalikan siasatan tentang aduan itu menurut s 10(2) dan s 103B Akta Profesion Undang-Undang 1976 ('APUU'). Setelah menerima keputusan LT pada 23 Februari 2007, pemohon telah mendesak LT membatalkan aduan terhadapnya. Apabila LT gagal berbuat demikian, pemohon telah membuat rayuan terhadap keputusan LT untuk mengadakan JT bagi menyiasat aduan tersebut. Walau bagaimanapun, pada 12 Mac 2207, LT telah memaklumkan pemohon bahawa memandangkan keadaan kini dikawal oleh Akta (Pindaan) Profesion Undang-Undang 2006 ('pindaan APUU'), yang mula berkuat kuasa pada 2 Oktober 2006, pemohon hanya satu bulan dari penerimaan tentang pemberitahuan keputusan LT untuk mengemukakan rayuannya dan rayuan tersebut patut dibuat melalui usul pemula yang menyatakan alasan-alasan rayuan menurut s 103E pindaan APUU. Selepas 26 Mac 2007, pemohon telah membuat rayuan ini melalui notis usul pemula. Adalah kes pemohon bahawa oleh kerana aduan itu telah ditarik balik tanpa ragu-ragu di hadapan TS, LT secara mandatori bertanggungjawab untuk membatalkan aduan daripada buku daftar. Pemohon

selanjutnya berhujah bahawa oleh kerana LT telah gagal mematuhi ss 102(3) APUU dan bertindak ultra vires Akta itu, keputusannya untuk mengadakan JT hendaklah diketepikan. Pemohon juga berhujah bahawa pindaan APUU tidak terpakai dalam kes ini. LT menegaskan bahawa di bawah k 7 Kaedah-Kaedah Profesion Undang-Undang (Prosiding Tatatertib) 1994 ('Kaedah') hanya pengadu yang mempunyai hak untuk menarik balik aduan, dan itupun secara bertulis kepada pengarah LT. LT juga menegaskan bahawa kes ini dikawal oleh pindaan APUU.

Diputuskan, membatalkan rayuan dengan kos:

(1) Adalah undang-undang tetap bahawa jika peruntukan itu bersifat prosedur maka perkataan 'shall' sahaja tidak menjadikannya mandatori kecuali statut itu sendiri menyatakan akibat ketidakpatuhannya. Dalam kes ini, perkataan yang digunakan dalam k 7 adalah 'may' dan bukan 'shall' atau 'must' dan lenggok bahasa juga tidak bersifat negatif. Peruntukan tentang penrikan balik aduan dengan ini hanya bersifat prosedur dan tiada akibat yang dinyatakan dalam kaedah untuk ketidakpatuhan penarikan balik mengikut cara yang ditetapkan (lihat perenggan 10–11).

(2) Hujah pemohon bahawa LT telah bertindak ultra vires Akta adalah tanpa merit. Oleh kerana pindaan APUU telah memotong s 102 APUU, sesyen yang dipotong itu tidak lagi terpakai dan LT tidak perlu mengemukakan apa-apa alasan bertulis kepada pemohon. Dalam apa keadaan s 102(3) APUU hanya menghendaki LT memberikan alasannya secara bertulis kepada pemohon sekiranya ia memutuskan bahawa tidak perlu diadakan siasatan rasmi dan setelah pemohon membuat permintaan agar alasan sedemikian diberikan kepadanya. Walau bagaimanapun, dalam kes ini LT telah memutuskan bahawa perlu diadakan siasatan rasmi dan pemohon telah gagal menunjukkan bahawa ia telah meminta LT memberinya alasan-alasan keputusannya. Selanjutnya, LT telah diberikan kuasa berasingan dan berbeza untuk melantik LT dan budi bicara ini adalah budi bicara mutlak. Oleh itu tiada pelanggaran rukun penting keadilan asasi sebagaimana didakwa oleh pemohon (lihat perenggan 18, 18(b)–(c), 23 & 25).

(3) Di bawah s 35(1) pindaan APUU tentang rayuan, s 103E baru adalah terpakai kepada semua rayuan kecuali yang telah didengar sebelum s 103E digubal. Oleh itu untuk rayuan yang masih belum selesai di hadapan Mahkamah Tinggi sehingga 2 Oktober 2006 atau yang telah difailkan hanya selepas 2 Oktober 2006, pindaan APUU adalah terpakai. Oleh kerana rayuan ini telah difailkan selepas tarikh s 103E pindaan APUU berkuat kuasa maka peruntukan pindaan APUU adalah terpakai. Dengan itu, peruntukan yang terpakai dalam kes pemohon adalah peruntukan pindaan APUU. Adalah jelas bahawa menurut s 103E

pindaan APUU rayuan hanya boleh dibuat terhadap keputusan LT selepas ia telah membuat keputusan menurut s 100(5), (8) (9) atau s 103D pindaan APUU. Berdasarkan fakta kes ini LT hanya mengarahkan agar siasatan rasmi diadakan oleh JT tentang aduan tersebut tetapi ia tidak membuat apa-apa keputusan atas merit pengataan faktual berkaitan aduan tersebut. Oleh demikian, tiada peruntukan dalam pindaan APUU yang membenarkan pemohon membuat rayuan terhadap keputusan LT dan rayuan ini adalah tidak kompeten dan pramatang (lihat perenggan 34, 36, 38, 41, 48 & 52).

(4) Selanjutnya, tindakan pemohon sendiri yang menarik balik rayuan pertama yang telah difailkannya dan pemfailan rayuan ini menunjukkan bahawa terdapat perakuan bahawa pindaan APUU adalah terpakai dalam kes ini. Oleh itu pemohon secara langsung dan tidak langsung telah mengakui bahawa peruntukan pindaan APUU adalah terpakai dan prinsip estopel patut digunakan terhadapnya (lihat perenggan 41).]

Notes

For cases on Disciplinary Board generally, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1715–1888.

For cases on rules of construction, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1874–1891.

Cases referred to

Bhavnagar University v Palitana Sugar Mill (P) Ltd 2003 (2) SCC 111 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

CIT v Anjum MH Ghaswalla 2002 (1) SCC 633 (refd)

Dato' Kanalingam a/l Velupillai v Bar Council & Anor [2004] 2 MLJ 504, HC (refd)

Jerald Allen Gomez v Shencourt Sdn Bhd, (Majlis Peguam, intervenor) [2006] 2 MLJ 343, HC (distd)

K Prasad v Union of India 1988 (Sup) SCC 269 (refd)

Lachmi Narayan v Union of India AIR 1976 SC 714, SC (refd)

Lebbey Sdn Bhd v Tan Keng Hong & Anor [2000] 7 MLJ 521; [2000] 1 CLJ 136, HC (refd)

Lembaga Tatatertib Peguam-Peguam v Wan Mohd Nazri bin Wan Hassan [2007] 2 MLJ 601, FC (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 ML J 1, FC (distd)

Malaysian Bar v Dato' Kanagalingam a/l Veluppillai [2004] 4 MLJ 153, FC (distd)

Nasir Ahmad v Emperor AIR 1936 PC 253, PC (refd)

PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ (Rep) 285, HC (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (distd)

A *Tan Boon Chee, David v Medical Council of Singapore* [1980] 2 MLJ 116, HC (distd)
Wong Keng Leong Rayney v Law Society of Singapore [2006] SGHC 179, HC (refd)
Yusuf Jumabhoy v The Law Society of Singapore [1988] 1 MLJ 491, HC (refd)

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Legislation referred to

Legal Profession Act 1976 ss 100(5), (8), (9), 101(1), 102, 102(1), (2), (b), (3), 103B, 103D, 103E, 103E(1), (4)
Legal Profession Act [SG] s 88(2)

C Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 rr 7, 7(1), 8, 17

Jasvinjit Singh (AJ Ariffin, Yeoh & Harpal) for the applicant.
CN Tan (Hishamuddin Allen & Gledhill) for the first respondent.
Second respondent in person.

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Mohd Zawawi J:

THE RELIEF SOUGHT BY THE APPLICANT

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[1] By originating motion ('OM') dated 26 March 2007 (encl 1), the applicant seeks the following relief:

(a) that the decision of the first respondent dated 9 February 2007 referring the withdrawn complaint by the second respondent dated 25 May 2005 to the Disciplinary Committee for formal investigation pursuant to ss 102(2) and 103B of the Legal Profession Act 1976 be set aside;

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(b) a declaration that the first respondent was obliged pursuant to r 7 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules') to strike out the said withdrawn complaint from the complaints register;

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(c) a declaration that the disciplinary proceedings against the applicant are governed by the Legal Profession Act 1976 applicable immediately before the coming into operation of the Legal Profession (Amendment) Act 2006;

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(d) pending the final disposal of this motion, all proceedings pursuant to the order of the first respondent of 9 February 2007 be stayed.

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[2] After considering the submissions filed by both parties, the court struck out the OM with costs.

PROCEDURAL HISTORY

[3] In order to understand the issues which give rise to this application it is necessary to state briefly the procedural history of the case:

(a) On 25 May 2005, the second respondent lodged a complaint with the Advocates and Solicitors Disciplinary Board ('the DB'). The complaint bore the No IT/05/0888 ('the complaint'). In the complaint, the second respondent alleged that on 18 January 1994 a sum of RM400,000 had been gifted to him by a businessman for the purpose of discharging his bankruptcy, but the applicant who was the second respondent's solicitor at that time, used the RM400,000 for his own personal gain and until today has failed to account for the money.

(b) On 20 October 2005, an investigation tribunal ('the IT') was appointed by the DB to look into the complaint. The IT hearing commenced on 28 March 2006 and carried through on 29 March 2006, 12 October 2006, 13 October 2006, 16 October 2006, 17 October 2006, 18 December 2006, 19 December 2006 and 20 December 2006. The IT was chaired by Mr Clement G Lopez and two other gentlemen, namely Mr Loh Siew Hock and Mr Ng Goon Fong.

(c) By a report dated 5 January 2007, the IT then recommended that the complaint be dismissed because there was a proposal for settlement on terms reached between the applicant and the second respondent.

(d) On 9 February 2007, the DB considered the complaint and the recommendations of the IT and decided to constitute a Disciplinary Committee to conduct an investigation into the complaint pursuant to ss 102(2) and 103B of the LPA 1976 ('the DB's decision').

(e) On 6 March 2007, the applicant informed the DB and the director of the complaints secretariat that since the complaint had been withdrawn, the director is mandatorily obliged to comply with r 7 of the Legal Profession (Disciplinary Proceedings) Rules and strike out the complaint from the register.

(f) On 9 March 2007, the applicant lodged an appeal by way of a notice of appeal dated 7 March 2007 against the decision of the DB to convene a Disciplinary Committee to investigate into the complaint.

(g) On 12 March 2007, the DB wrote to the applicant and put him on notice that the Legal Profession Amendment Act 2006 ('the amended Act') had come into force on 2 October 2006 and that pursuant to s 103E of the amended Act read together with the saving and transitional provision in

s 35 of the Legal Profession (Amendment) Act 2006:

(i) an appeal against the decision of the DB should be lodge within one month from the date of notification of the DB's decision (that was received by the applicant on 23 February 2007); and

(ii) the appeal against the DB's decision should have been brought by way of an originating motion setting out the grounds of appeal pursuant to s 103E(1) and (4) of the amended Act.

(h) On 22 March 2007, the applicant wrote to the DB to express his concerns regarding the effect of the amendments to the Legal Profession Act. The applicant recognised that he did not have a right to appeal the decision of the DB in the said letter. Nevertheless, the applicant filed an appeal by way of a notice of originating motion dated 26 March 2007 in encl 1 ('the current appeal'). Therefore the appeal was officially lodged on 26 March 2007.

[4] At the outset, the court wishes to emphasise that the court is not concerned with the substantive merits of the second respondent's case against the applicant.

THE ISSUES

[5] The issues that arise for consideration are as follows:

(a) whether there was a withdrawal of the complaint;

(b) whether the Disciplinary Board's decision to constitute a Disciplinary Committee is proper; and

(c) whether the amended LPA applies to the current appeal.

DISCUSSION ON ISSUE (A)

[6] The applicant submits that on 20 December 2006, midway through the investigation by the IT, the second respondent withdrew the complaint. According to the applicant, the withdrawal is evidenced by the notes of proceedings before the IT as follows:

(a) At p 10 of encl 2, under the heading 'Report of the Investigating Tribunal', it was stated that:

> The Tribunal noted that the Complainant and the Respondent had reached an amicable settlement, by virtue of which this Complaint was withdrawn without any liberty to the afresh …

(b) At p 18 of encl 2, from para (a) onwards, it was patently clear that:

(a) The IT did not complete its investigations;

(b) The investigation were terminated when counsel for the complainant withdrew the complaint at the hearing on 20 December 2006.

(c) At the time of the withdrawal, the complainant had not closed its case. The complainant's witness, Mr Leong Tuck Onn, was being cross-examined by the respondent when the complainant's counsel withdrew the complaint. The respondent had not yet been called upon to give his explanation. In view of the withdrawal, the respondent was not called upon to explain.

(d) The recommendation made by the IT was solely based on the withdrawal, and not based on a consideration of the evidence before it.

(e) It was the understanding of the IT that the complaint would be struck out on the basis that it was withdrawn.

(c) At p 16 of the applicant's second affidavit, it was stated that:

> Dato Dominic: Through the intervention of Mr Leong Tuck Onn, the Complainant withdraws this Complaint and all other pending complaints without liberty to file afresh.

Further down the page, the chairman records as follows:

> The Panel records its appreciation to Mr Leong Tuck Onn for successfully intervening towards resolving this matter and to Counsel and all parties for their cooperation. Panel will recommend the dismissal of this Complaint without liberty to this afresh.

[7] The appellant further submits that from the above records of the investigation proceedings of the IT, it is clear that the complaint was withdrawn unequivocally and the proceedings before the IT were then terminated without any finding being made.

[8] The first respondent holds a contrary view. According to the first respondent, it is incorrect for the appellant to refer to the second respondent's complaint as a 'withdrawn Complaint', the reason being that there was never any withdrawal by the complainant. According to the first respondent, whichever way one chooses to read r 7(1), it cannot be read to mean that a person *other than* the complainant may withdraw the complaint (by addressing it to IT instead of the director of the Disciplinary Board).

A FINDINGS AS REGARDS TO ISSUE (A)

[9] With respect, the court cannot agree with the submission of the first respondent. Rule 7 of the Rules is quoted below:

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7. Withdrawal of complaints

(1) A complainant may at any time, by letter addressed to the Director, withdraw his complaint.

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(2) Upon receipt of a letter withdrawal under subrule (1), the Director shall forthwith inform the chairman of the Disciplinary Board and the Secretary of the Bar Council in writing of the withdrawal of the complaint enclosing a copy of the letter of withdrawal.

(3) Subject to rule 8, the Director shall strike out the withdrawn complaint from the Complaints Register.

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[10] From a plain reading of this provision, it is apparent that the rule is procedural one where it prescribes the procedure for a complainant to withdraw the complaint. It is settled law that if a particular statutory provision is a procedural one, even the use of the word 'shall' in such provision will not make it mandatory unless consequence of disobience has been indicated in the statute. In the case of *Lachmi Narayan v Union of India* reported in AIR 1976 SC 714, the Supreme Court of India pointed out some of cases where the provision must be held to be mandatory. Those are enumerated below in the exact language of the court:

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> The primary key to the problem whether a statutory provision is mandatory or directory is the intention of the law maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of 'must' instead of 'shall', that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory (Crawford, *The Construction of Statutes* at pp 523–524). Here the language of sub-s (2) of s 6 is emphatically prohibitive, it commands the government in unambiguous negative terms that the period of the requisite notice must not be less than three months.

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[11] In this instant case, the word used in r 7(1) is 'may' and not 'shall' or 'must' and the language also not in the negative form. The provision of withdrawing the complaint is a rather procedural one and no consequence is indicated in the rule for non-compliance of withdrawal in the manner prescribed.

[12] For violation of the mandatory provisions of statute, the result of the actions taken becomes a nullity but for non-compliance of a directory provision, the resultant does not become nullity if substantial compliance is made and no prejudice caused to a party affected by the said decision for such non-compliance (for cases on violation of the mandatory provisions of a statute, see *Nasir Ahmad v Emperor* AIR 1936 PC 253; *K Prasad v Union of India* 1988 (Sup) SCC 269, para 24; *CIT v Anjum MH Ghaswalla* 2002 (1) SCC 633; *Bhavnagar University v Palitana Sugar Mill (P) Ltd* 2003 (2) SCC 111)

DISCUSSION ON ISSUE (B)

[13] The applicant devoted a large portion of his written submission on this issue. The applicant alleged that the DB had failed to comply with the mandatory requirements of s 102(3) of the LPA as unamended and inform the applicant the manner in which it has determined the complaint. According to the applicant, s 101(1) of the LPA mandatorily requires the IT to provide a report on conclusion of the proceedings. By r 17 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the report shall state the findings of fact and recommendation of the IT.

[14] According to the applicant, due to the failure on the part of the DB to comply with s 101(1) and s 102(3) of the LPA, he was not be able to ascertain 'the manner in which the first respondent determined the complaint'. In the circumstances, in making its decision to convince a DC, the first respondent had acted ultra vires the Act and this decision must therefore be set aside.

[15] The applicant further submits that the IT's report was not in accordance with statutory form which requires it to address what could be paraphrased as 'the merits' of the complaint and state one of the recommendations required under the Act. The applicant posits that IT's report could not comply with the statutory requirement as its investigation had not been completed as a result of the withdrawal.

[16] To support his submission, the applicant cited the following cases:

(a) *Yusuf Jumabhoy v The Law Society of Singapore* [1988] 1 MLJ 491; and

(b) *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487.

[17] The first respondent submits that there is nothing in this instant case to show that the first respondent had acted ultra vires the Act when exercising the power conferred under s 102(2)(b) of the pre-amendment LPA.

A FINDINGS AS REGARDS TO ISSUE (B)

[18] After considering this issue carefully, the court is of the considered opinion that the applicant's submission is without merit for the following reasons:

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(a) Based on the first respondent's letter dated 5 March 2007 (para 3 thereof), it appears that the minutes of meeting of the board meeting on 9 February 2007 had in fact been forwarded to the applicant together with the letter (please see exh 'HSG3' of the applicant's supporting affidavit).

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(b) There is no s 102 in the amended LPA as s 102 of the Legal Profession Act 1976 (pre-amendment) ('the pre-amendment LPA') was deleted by the Amendment Act. Therefore, the section is no longer applicable and the first respondent is not required to furnish any written reasons to the applicant. Furthermore, the applicant has filed the OM herein under the amended LPA. Therefore, he cannot be relying on the provisions of the pre-amendment LPA to support his submission.

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(c) If, for the sake of argument, the pre-amendment LPA is applicable in this instant case, s 102(3) of the pre-amendment LPA only requires the first respondent to furnish the applicant with its reasons in writing in the event that it decided that a formal investigation is unnecessary and after the applicant makes a request for such reasons to be furnished to him. In this instant case, the first respondent in fact had decided that a formal investigation is necessary. Also, the applicant failed to aver or show that the applicant had requested the first respondent to furnish him with reasons for its decision and the first respondent had refused to do so.

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[19] The case of *Yusuf Jumabhoy v The Law Society of Singapore* does not support the applicant's submission. Firstly, the *Yusuf Jumabhoy* case is a Singapore case. Section 88(2) of the Singapore Legal Profession Act is not reproduced in that case and there is nothing to show whether it is in pari materia with s 102(3) of the pre-amendment LPA. Secondly, according to the learned judicial commissioner in the *Yusuf Jumabhoy*'s case, 'the expression 'reason' means the grounds of explanation for the decision of the council'. Therefore, it is reasonable to interpret the words 'the manner in which it has determined the application or complaint' in s 102(3) of the pre-amendment LPA as referring to the decision of the first Respondent and not the reasons themselves. If the applicant wishes to be provided with the reasons for the first respondent's decision, he must make a request for such reasons to be furnished.

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[20] As to the other case cited by the applicant in support of his submissions ie *Rohana bte Ariffin v Universiti Sains Malaysia*, that case does not concern the

interpretation of s 102(3) of the pre-amendment LPA nor any similar provisions and not relevant to the instant case.

[21] In para 45 of the applicant's submissions, the applicant submitted that since the IT's report 'is outside the purview of the LPA, the first tespondent therefore cannot act on such a report in convening a Disciplinary Committee'. In para 51, the applicant submitted that the first respondent 'acted ultra vires when it considered an incomplete and incompetent report' by the IT in coming to its decision.

[22] In this instant case, it is clear that instead of making one of three recommendations listed in s 102(1) of the pre-amendment LPA ie:

(a) that a formal investigation is not necessary;

(b) that no cause of sufficient gravity exists for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty; or

(c) that there should be a formal investigation by a Disciplinary Committee,

the IT purported to recommend in the IT's report that the complaint be 'dismissed' (please see exh HSG3 (p 11) to the appellant's supporting affidavit).

[23] Pursuant to s 102(2)(b) of the pre-amendment LPA, the first respondent upon receiving the IT's report was entitled to disagree with the IT's recommendation and appoint a DC. In the case of *Lembaga Tatatertib Peguam-Peguam v Wan Mohd Nazri bin Wan Hassan* [2007] 2 MLJ 601 the court held that the DB is vested with an independent and distinct power to appoint a DC and this discretion is an absolute discretion. Further, r 8 of the Rules clearly provides:

> 8. Bar Council or State Bar Committee may proceed with complaint
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> (1) Notwithstanding the withdrawal of a complaint under rule 7 and without prejudice to its right to make a complaint of its own motion, the Bar Council or a State Bar Committee may, if it considers there is merit in the complaint, intervene and proceed with the complaint as if it was made of its own motion.

[24] In addition, if it is true that the IT's report is 'outside the purview of the LPA' as alleged by the applicant, then all the more the first respondent should disagree with the IT's recommendation and appoint a DC to investigate the complaint.

[25] Based on the above reason, the court holds that there is no breach of the fundamental rules of natural justice as alleged by the applicant. The facts in the cases of *Jerald Allen Gomez v Shencourt Sdn Bhd, (Majlis Peguam, intervenor)*

[2006] 2 MLJ 343 *Malaysian Bar v Dato' Kanagalingam a/l Veluppillai* [2004] 4 MLJ 153 and *Tan Boon Chee, David v Medical Council of Singapore* [1980] 2 MLJ 116 which are relied on by the applicant are obviously different from the facts of the current appeal and can be easily distinguished.

DISCUSSION ON ISSUE (C)

[26] The applicant submits that the amended LPA does not apply to this instant case. The application set out the following chronology of events leading up to these issues:

(a) 25 May 2005 — complaint lodged (unamended Act applied).

(b) 2 October 2006 — LPA Amendment Act comes into force.

(c) 20 December 2006 — Complaint withdrawn.

(d) 22 February 2007 — The first respondent decides to constitute DC.

[27] According to the applicant, s 35(1) of the amended Act only applies to pending appeals, appeals in the course of being heard or otherwise heard but no order or decision had been made at the time the amended Act came into force. As such, s 35(1) is inapplicable. Section 35(2) provides that disciplinary proceedings pending before the board shall continue under the unamended Act. Section 35(3) provides that any complaint concerning the advocate and solicitor referred to the board before the amended Act shall be 'dealt with' under the pre-amended Act.

[28] The applicant further submits that although by the time the appeal was lodged, the amended s 103E(1) comes into force, it matter not one naught as the right to appeal become vested in the appellant at the time of the second respondent commenced proceeding against the appellant before the Disciplinary Board. Thus, the appellant is entitled to appeal.

[29] The first respondent submits that the amended Act applies in this case by virtue of PU(B) 248/2006 dated 26 September 2006 which states that the amended Act comes into operation on 2 October 2006.

FINDINGS AS REGARDS TO ISSUE (C)

[30] It should be recalled that the applicant initially filed an appeal by way of notice of appeal on 9 March 2007 ('the first appeal'). Subsequently, on 22 March 2007, the first respondent wrote to the applicant to inform him that his appeal should be made under the amended LPA as s 35(1) of the Amendment Act is applicable to his case. On 26 March 2007, the applicant

filed the current appeal. By the applicant's own conduct of withdrawing the first appeal and filing the current appeal, he has acknowledged that the amended LPA applies.

[31] The proceedings in this instant case has come to the appeal stage. Now, the issue is whether the applicant is entitled to file this appeal in view of s 35(1) of the Amendment Act. With respect, it wrong for the appellant to submit that s 35(1) is *inapplicable* to the current appeal. In regards to s 35(2) and s 35(3) of the Amendment Act, these section do not apply to cases involving appeals because these sections deal with 'disciplinary proceedings which were pending before the Disciplinary Board' at the date of coming into operation of the Amendment Act and any 'complaint … referred to the Disciplinary Board before the date of coming into operation of [the Amendment Act]' respectively.

[32] Section 35(1) is the section that deals with *appeals* and is therefore the guide for us to determine whether a particular appeal is to be decided under the provisions of the pre-amendment LPA or the amended LPA.

[33] Section 35(1) of the Amendment Act provides that where on the date of coming into force of the Amendment Act ie on 2 October 2006:

(a) appeal under s 103E were pending before the High Court … the proceedings shall be continued under and in conformity with the provisions of s 103E as amended by the Amendment Act; and

(b) any appeal was in the course of being heard, or had been heard but no order or decision had been made on the appeal, the proceedings shall continue under the provisions of the principal Act applicable to those proceedings immediately before the date of coming into operation of the Amendment Act.

[34] So, what appears from s 35(1) is that the new s 103E will apply to all appeals unless they have already been heard before the coming into being of the new s 103E.

[35] Before proceeding further, it should be noted that it does not matter whether the complaint was lodged before or after the coming into force of the Amendment Act. What matter is the stage of the appeal when the Amendment Act came into force. In regards to the current appeal, it was only filed after the Amendment Act came into force on 2 October 2006. Since the amendment LPA applies to appeals pending before the High Court on 2 October 2006, it must definitely apply to appeals which are filed after that date because by then the Amendment Act had already came into operation and the court must apply statutes which has already came into force.

[36] The reason why appeals which have already in the course of being heard or having been heard but no order or decision had been made are covered by the pre-amendment Act is that such appeals had already reached an advanced stage and not merely pending before the High Court as at 2 October 2006. For appeals which are already pending before the High Court as at 2 October 2006 or filed only after 2 October 2006, the amended LPA applies.

[37] The first respondent's letter to the applicant on 22 March 2007 clearly states that s 35(1) of the Amendment Act applies to the current appeal. A circular from the Chief Judge of Malaya (No 1/2006) was enclosed (please see Tab 5 of the *ikatan authoriti responden pertama*). Clearly, what matters is the *stage of the appeal* (not pending disciplinary proceedings or complaint).

[38] The applicant's submission in regards to s 103E cannot hold water because the current appeal was filed after the date s 103E of the amended LPA came into operation and therefore it goes without saying that the provisions of the amended LPA applies.

[39] Concerning 'retrospective operation' of the statute, *NS Bindra's Interpretation of Statute*, (8th Ed), had this to say at pp 768–769:

> The question whether a statute operates prospectively or retrospectively is one of legislative intent. If the terms of a statute are clear and unambiguous and it is manifest that the Legislature intended the Act to operate retrospectively make the intention certain or clear, the statute will be presumed to operate prospectively, where it is in derogation of a common law right, or where the effect of giving it a retrospective operation would be to interfere with an existing contract, destroy a vested right or create a new liability in connection with a past transaction or invalidate a defence which was good when the statute was passed.
>
> …
>
> Every legislation is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. This rule of interpretation is applicable for the purpose of interpreting the Constitution also.

[40] Cases such as *Rohana bte Ariffin v Universiti Sains Malaysia* and *Lim Phin Khian v Kho Su Ming* [1996] 1 ML J 1 which are referred to by the applicant are irrelevant as these cases do not deal with the LPA but other statutory provisions (such as the Courts of Judicature (Amendment) Act 1995) or the general law. It is trite law that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (*generalibus specialia derogant*) (see the Federal Court case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ (Rep) 285). In any event, as the facts and issues in the cases referred to by

the applicant are different, the cases must be distinguished (see the case of *Lebbey Sdn Bhd v Tan Keng Hong & Anor* [2000] 7 MLJ 521; [2000] 1 CLJ 136).

[41] Based on the above reasons, it is clear that the applicable provisions in the applicant's case are the provisions of the amended LPA. The first respondent was right in stating that the applicant's appeal shall be made pursuant to the amended LPA. It is appropriate to mention here that on 22 March 2007, the first respondent wrote to the applicant to inform him that his appeal could be made under the amended LPA as s 35(1) of the Amendment Act is applicable to his case. The applicant duly complied by withdrawing the first appeal and filing the current appeal. Therefore the applicant has directly or indirectly admitted that the provision of the amended LPA apply in this case. The principle of estoppels as explained in the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331should be invoked against the applicant.

[42] However, that is not the end of the matter. The second respondent submits that the applicant has no right of appeal as the Complaint has yet to be formally investigated by the DC and DB made no decision on any recommendation by the DC. The first respondent in deciding to constitute a DC did not make any decision or final decision on the merits of the complaint. Therefore, there is no decision for the applicant to appeal against.

[43] The applicant has contended that he would be prejudiced if the first respondent makes a decision to constitute a DC without the IT having heard his defence. The applicant also submitted that the IT's report was 'incomplete and void' as 'the applicant had not given his evidence and further the IT had not heard all the evidence and submissions in view of the withdrawal of the complaint at the stage of the complainant's case' and that the first respondent had 'perpetrated a breach of natural justice' in giving the consideration to the IT's report (para 61; please see also paras 77–78 of applicant's written submission).

[44] In response, the first respondent submits that in actual fact the proceedings before the IT is not formal but is held solely for the purpose of determining whether there is a prima facie case which calls for a formal investigation by a DC. It is only at the DC stage that formal investigations are conducted.

[45] According to the first respondent, if the disciplinary proceedings is allowed to proceed at the DC stage and the DC completes its investigations and presents its recommendation to the first respondent after receiving the DCs committee's recommendation, the applicant has a right to appeal to the

A High Court within one month from the receipt of the notification of the decision (see s 103E of the amended LPA). Thus, the applicant has not been deprived of his right of appeal to the High Court but he must do so at the appropriate stage. In this case, the applicant has filed this appeal to this court without waiting for the DC to complete its investigation.

B

[46] Before proceeding further, perhaps it would appropriate at this juncture to comment on the functions of the IT. The court agrees with the submission of the first respondent that the IT would be performing a 'filtering' or 'sifting' function in order to ensure that less serious, trivial or frivolous cases are not C referred to DC for formal investigation. Put simply, the IT acts as a 'filter' of sorts, thereby ensuring that only the most serious complaints are referred to the DB. The Bar Council receives a lot of complaints a year. A number of them are without substance and are sifted by the IT, while the remainder goes to DB for a full investigation or inquiry. If the IT is not to sift, the case load on DB will D more than double. Doubling the case load of the DB will create a serious strain on scare resources and slow down the disciplinary process.

WHETHER THE CURRENT APPEAL IS PREMATURE

E

[47] Section 103E reads as follows:

(1) Any party aggrieved by any decision or order made by the Disciplinary Board under subsection 100(5), 100(8) or (9) or section 103D shall have the right to appeal to the High Court within one month of the receipt of F the notification of the decision or order complained against; and no appeal shall lie against any other decision or order made by the Disciplinary Board.

(2) There shall be no judicial review against any decision or order made by the Disciplinary Board. G

(3) The appeal shall be fixed for hearing before a single judge of the High Court.

(4) The appeal shall be by way of an originating motion setting out the ground of appeal supported by affidavit. H

(5) Any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court.

(6) The Bar Council may in its discretion intervene at any stage of any appeal I under this section.

(7) The Disciplinary Board shall not be cited as a party in any appeal under this section.

(8) The Disciplinary Board shall have the right to appear in and address any

> High Court, the Court of Appeal or the Federal Court hearing any appeal under this section by an advocate and solicitor whether or not the advocate and solicitor is a member of the Disciplinary Board or the Bar Council.

[48] It is clear that pursuant to s 103E, an appeal can only be brought against a decision of the DB, if and only if, it is a decision given pursuant to s 100(5), (8) or (9) or s 103D of the Amendment Act. Having regard to the decision in the *VK Lingam* cases (see *Dato' Kanalingam a/l Velupillai v Bar Council & Anor* [2004] 2 MLJ 504 and *Malaysian Bar v Dato' Kanagalingam a/l Veluppillai* [2004] 4 MLJ 153, the court is not going to suggest that the applicant is not to be characterised as 'party aggrieved' within the meaning of — s 103E of the Act (whether post or pre-amendment). What is however quite clear from the fact pattern is that the DB has made no decision on the merits of the factual allegations or matters relating to the complaint. All the DB has done is merely to direct that a formal investigation be conducted by the DC on the complaint against the applicant (see the case of *Wong Keng Leong Rayney v Law Society of Singapore* [2006] SGHC 179).

[49] Section 100(5) provides that:

> Where the Disciplinary Board is satisfied that there is no merit in the application or complaint under subsection (2) or (3), the Disciplinary Board shall dismiss the application or complaint and notify the complainant and the advocate and solicitor of its decision.
>
> The Disciplinary Board may impose any one of the follow:
>
> (a) the recording of a reprimand or censure against the name of the advocate and solicitor;
>
> (b) imposition of a fine upon the advocate and solicitor for such sum as the Disciplinary Board deems just;
>
> (c) suspension of the advocate and solicitor from practice for such period not exceeding five years as the Disciplinary Board deems appropriate in the circumstances; or
>
> (d) striking the advocate and solicitor off the Roll.

[50] Section 100(9) provides that:

> The imposition of a penalty or punishment shall not preclude the Disciplinary Board from making an order of restitution of any sum found due and owing to the complaint and stipulating the time within which such restitution ought to be made, failing which the Disciplinary Board may impose on the advocate and solicitor a higher punishment than that previously imposed.

[51] Section 103D provides that:

(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.

(2) The Disciplinary Board may in appropriate cases impose a greater punishment than that recommended by the Disciplinary Committee.

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

(4) Before the Disciplinary Board makes an order under subsection (2) or any order that is likely to be adverse against an advocate and solicitor under subsection (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

(5) Where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant of any sum found due and owing to the complainant, it may stipulate the time within which such restitution ought to be made, failing which the Disciplinary Board may impose on the advocate and solicitor a higher punishment that that previously imposed.

(6) A sum ordered by the Disciplinary Board under subsection (5) to be restituted may be recovered by the complainant as a civil debt.

[52] As can be seen above, there is clearly no provision within the amended Act to allow the applicant to lodge an appeal against the decision of the DB to refer the complaint to the DC and therefore the current appeal is incompetent and premature.

[53] Further, there was no breach of natural justice as alleged as the applicant was present during the IT proceedings and was given the opportunity to be heard only to have arrived at a 'settlement' with the second respondent which led to the IT being informed that the complaint was being 'withdrawn'.

CONCLUSION

[54] For the reasons set out above, I would strike out the OM/current appeal with costs.

Appeal struck out with costs.

Reported by Kohila Nesan